BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

RUSSELL J. GRANT	)	
Claimant	)	
v.	)	
	)	Docket No. 1,070,110
FIRSTAMERICA	)	
Respondent	)	
and	)	
	)	
NEW HAMPSHIRE INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and insurance carrier (respondent) request review of the June 24, 2015, Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on November 3, 2015.

APPEARANCES

Clark H. Davis, of Olathe, Kansas, appeared for claimant. John David Jurcyk, of Kansas City, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The Board has considered the entire record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found respondent did not prove claimant's October 31, 2012, accidental injuries resulted from his failure to wear his seat belt, that his conduct was either a willful failure to use a guard or protection, or a reckless violation of respondent's workplace safety rules. The ALJ also found claimant did not prove his left elbow and right forearm injuries were consequences of his October 31, 2012, accidental injuries. The ALJ concluded claimant sustained a 34.5 percent whole body functional impairment, and claimant is permanently and totally disabled.

Respondent contends claimant should be denied benefits because he willfully failed to use a reasonable guard or protection against accident or injury and recklessly violated respondent's safety rules. Respondent maintains claimant disregarded known risks by

consciously deciding to remove his seat belt, thus failing to comply with traffic statutes. Respondent requests the Board find claimant's alleged right knee, right shoulder, right hand and left elbow injuries were not causally related to his accident. Respondent also argues medical treatment for claimant's upper extremities, right knee and heart was unrelated to his accident and it should not be required to pay for such treatment. Respondent further contends greater weight should be given to the 5 percent cervical spine rating of the court appointed neutral physician, Dr. Peter Bieri, and less weight should be accorded the rating of claimant's hired expert, Dr. Edward Prostic. Finally, respondent argues claimant is not permanently and totally disabled.

Claimant requests reversal of the ALJ's finding that claimant's right wrist and left elbow injuries were not caused by the accident, and urges the Award be affirmed in all other respects.

The issues are:

1. Should compensation be disallowed because: (a) claimant's injury resulted from his willful failure to use a guard or protection required pursuant to statute or voluntarily provided by respondent or (b) his reckless violation of respondent's workplace safety rules?

2. Is medical treatment for claimant's upper extremities, right knee and heart causally related to his work injury and should respondent be required to pay for such treatment?

3. Did the ALJ err in giving equal weight to the ratings of Drs. Bieri and Prostic in determining claimant's functional impairment?

4. Is claimant permanently and totally disabled on account of the injury?

FINDINGS OF FACT

Claimant resides in Linn Valley, Kansas, and was 78 years old when he testified at the March 3, 2015 regular hearing. He began working for respondent as a school bus driver in June 1998, and continued to work in that capacity until his accidental injury on October 31, 2012. Claimant drove two routes transporting students to and from school. One route was in the morning and the other in the afternoon, each lasting approximately two and a half hours.

On September 27, 2012, claimant underwent surgical implantation of a pacemaker. When claimant returned to work, his three-inch surgical incision, located in the area of his left shoulder, had not fully healed and, according to claimant, the shoulder strap from the bus's seat belt irritated his incision and caused pain. Claimant testified that after dropping

off all of the children, he sought relief from his discomfort by taking off his seat belt for the drive back to the bus lot.

At approximately 3:30 p.m. on October 31, 2012, claimant dropped off the last group of students, and commenced the 30 to 45 minute drive back to the bus lot. When he was 15 to 20 minutes away from the lot, claimant removed his seat belt. The bus, traveling between 50 and 55 miles per hour, hit something in the road, causing claimant to lose control of the vehicle and veer into a ditch. When the bus hit the ditch, claimant was thrown to the steel floorboard and then into the steel stairwell. He experienced immediate symptoms in his neck and right shoulder.

Claimant was transported to the Overland Park Regional Hospital emergency department, where he was found to have a complex fracture of C2, three rib fractures on the right and bruising of his right knee. Dr. Beatty, claimant's treating surgeon, applied a "halo," a rigid external fixation device requiring the placement of pins into the skull, with an attached frame fixed to a cast around his chest, thus immobilizing the cervical spine.

On November 8, 2012, claimant was transferred to Menorah Medical Center, under the care of Dr. Steven Rosenberg. Claimant's halo thereafter slipped and loosened, requiring surgical correction, performed by Dr. Beatty on November 15, 2012. Claimant wore the cervical halo for 100 days.

On May 2, 2013, Dr. Beatty performed a right carpal tunnel release and on June 7, 2013, a left cubital tunnel release, both conditions alleged to be due to nerve damage from the accident. On November 11, 2013, Dr. Daniel Stechschulte performed a right total knee replacement.

Claimant also sustained an injury to his right rotator cuff, which has not been surgically treated. Dr. Stechschulte offered to surgically repair the shoulder, but claimant declined such treatment. Claimant testified he will live with the pain, but cannot lift his right arm. Claimant was released from treatment on November 11, 2014.

Claimant testified he completed high school, attended Victoria College for two years, and graduated from the University of Houston in 1968, with a business degree. Prior to working for respondent, claimant was a salesman/contractor for Morton Portable Buildings. In that position, he sold buildings and arranged for contractors to construct them. Claimant's work for Morton required a lot of walking to take inventory, completing paperwork, and going to job sites to inspect buildings and ensure they were properly constructed. Claimant testified he could not currently do the walking and driving required by the job with Morton.

When respondent hired claimant in 1998, he did not receive a safety manual or written safety policies from respondent, and does not remember discussing any such policies during his orientation. According to claimant, he did not know if respondent had

a policy about wearing seat belts. Claimant testified safety policies were not posted at his workplace because it was only a parking lot with no office or building. Claimant was never reprimanded by respondent for not wearing his seat belt. However, each year respondent conducted a behind-the-wheel evaluation to check if safety procedures were being followed. Respondent did not tell claimant he must wear a seat belt and claimant was unaware of other employees reprimanded for not wearing a seat belt.

Claimant asserted he wore his seat belt at all times before his pacemaker surgery because the law required it and for safety. Without the pacemaker incision, claimant would have worn the seat belt. Claimant did not think it was unsafe to remove his seat belt for the short time he did not use it. Claimant testified he did not know whether he would have been injured if he had worn the seat belt because he still hit something in the road which caused him to lose control of the bus. However, claimant admitted that had he used his seat belt, he would not have been thrown to the floor or into the stairwell when the bus hit the ditch.

In 2010, claimant was suspended for three days without pay for operating a bus while using his cell phone. Claimant's manager told claimant someone reported he was using his cell phone while driving the bus after he let the children off, while he was returning to the bus lot. Claimant told respondent he did talk on his cell phone, but at the time, there were no children on the bus. Claimant understood respondent's policy was no cell phone use when children were on the bus.

Claimant took a written test and underwent a physical examination to obtain his commercial driver's license (CDL) in 1998. Claimant's CDL has since expired because he was unable to meet the medical requirements. With both his CDL and regular driver's license, claimant learned the law required drivers to wear seat belts when driving.

Claimant's employment was terminated the day after his accident and he has not worked since.

Claimant testified he currently experiences constant pain and occasional muscle spasms from his neck down into his right shoulder. The pain goes into his right hand and he has no feeling in the first three fingers in that hand. Claimant asserted he cannot hold anything with the right hand and has no feeling in the small finger of his left hand. Claimant is right hand dominant and uses his left hand because he cannot hold anything in his right hand. Claimant has no problems with his right knee since it was replaced.

At the request of claimant's counsel, Edward J. Prostic, M.D., an orthopedic surgeon, evaluated claimant on July 29, 2014. He took a history, reviewed records and performed a physical examination.

Dr. Prostic diagnosed a healed fracture at C2 and cervical soft tissue injuries; severe, full thickness rotator cuff tear and early osteoarthritis of the right shoulder; right

carpal tunnel syndrome, post surgical release, with continuing neurologic symptoms in the right upper extremity; left cubital tunnel syndrome with ulnar nerve release at the left elbow; and osteoarthritis of the right knee.

Dr. Prostic testified claimant's October 31, 2012, accident was the prevailing factor for his injuries to the cervical spine, both upper extremities, including the right shoulder, and rib fractures.

Dr. Prostic rated claimant's impairment of function at 20 percent to the whole body for the cervical spine; 20 percent to the right upper extremity, or 12 percent whole body impairment, for the right shoulder; 20 percent right upper extremity, or 12 percent whole body impairment, for neurologic damage, loss of strength and decreased sensory discrimination; 10 percent to the left upper extremity, or 6 percent whole body impairment, for neurologic damage; and 37 percent to the right lower extremity, or 15 percent whole body impairment, for the right knee replacement. Dr. Prostic's aggregate rating was 49 percent to the body. In the doctor's opinion, the October 31, 2012, accident is the prevailing factor for all claimant's permanent impairment.

Dr. Prostic testified claimant's permanent restrictions include no overhead activities with his right upper extremity; no work requiring rotation of his head to the left; no significant vibration which would aggravate his neck; no forceful gripping, frequent keying or writing with the right hand; and no more than 15 minutes standing or walking per hour.

Dr. Prostic testified claimant is unable to perform all 6 of the job tasks identified by vocational consultant Terry Cordray. According to Dr. Prostic, it is highly unlikely claimant can return to work in the open labor market, given his severe difficulties using his arms and limited mobility. Dr. Prostic testified that, at age 78, claimant is too old for vocational retraining.

Dr. Prostic testified claimant could have sustained injuries in the accident even if he were wearing his seat belt. Claimant's C2 fracture required striking the head, so he probably struck his head on the roof of the bus. Claimant could have had cervical radiculopathy, rotator cuff rupture, peripheral nerve entrapment and bruising to his knee while wearing the seat belt and shoulder harness. At claimant's age, he was more susceptible to injury even with a seatbelt or shoulder strap.

Peter V. Bieri, M.D., a neutral physician appointed by the ALJ, examined claimant on December 15, 2014. Dr. Bieri also took a history, reviewed medical records and performed a physical examination.

Dr. Bieri testified claimant's cardiac implant was the prevailing factor in the medical treatment related to claimant's heart, and the prevailing factor for claimant's neck injuries and fractures was the accident. Dr. Bieri testified claimant had preexisting degenerative joint disease of the right knee. Dr. Bieri believed the accident increased claimant's

symptoms, but the preexisting degenerative joint disease was the prevailing factor in his need for the right knee replacement.

For the right shoulder, Dr. Bieri diagnosed partial right rotator cuff tear with adhesive capsulitis, which is a painful condition of the shoulder, accompanied by reduced active range of motion. With no history of previous symptoms, Dr. Bieri opined the prevailing factor for treatment for claimant's right shoulder was the accident.

Dr. Bieri's report of December 15, 2014, outlined his ratings and restrictions. Using the AMA *Guides*,[1] Dr. Bieri found a 5 percent whole person impairment for the C2 fracture; a 9 percent right upper extremity impairment for right shoulder range of motion; a 4 percent right upper extremity impairment for rotator cuff weakness; and a 10 percent right upper extremity impairment for mild entrapment neuropathy at the right wrist. The combined right upper extremity impairment was 21 percent, or 13 percent whole person impairment. Dr. Bieri also found a 10 percent left upper extremity impairment for mild entrapment neuropathy at the elbow, or 6 percent whole person impairment; a 37 percent right lower extremity impairment for the total knee replacement, or a 15 percent whole person impairment. The total whole person impairment was 34 percent.

Dr. Bieri imposed permanent restrictions: no greater than sedentary to light work; occasional lifting not to exceed 15 pounds; frequent lifting not to exceed 10 pounds and negligible constant lifting; no shoulder level and overhead use with the right arm; sustained ambulation with assistance limited to 100 feet on a level surface, with postural adjustment; and lifting, pushing, and pulling to be evaluated in terms of intensity and duration of the activity. Dr. Bieri's report states claimant could not perform two of Mr. Cordray's six work tasks and the doctor agreed with Dr. Prostic and Mr. Cordray that claimant was permanently and totally disabled from gainful employment.

Dr. Bieri testified claimant could have sustained soft tissue injuries to the cervical spine, with upper extremity radiculopathy, even if he wore his seat belt. Dr. Bieri testified seat belt wearers can still suffer whiplash trauma and cervical fractures.

Terry L. Cordray, a vocational rehabilitation consultant, interviewed claimant on August 7, 2014, and reviewed medical records. Mr. Cordray found claimant graduated from high school in Texas in 1955 and attended community college in Houston for two years. Claimant completed his bachelor's of science degree in business from the University of Houston in 1968. He has no computer training or experience. Claimant previously worked selling Morton buildings, but, according to Mr. Cordray, his lack of computer skills is a significant vocational barrier in a business job and claimant is impaired by his lack of any computer skills for purposes of job placement.

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

Mr. Cordray testified Dr. Bieri's restrictions were in conflict because the doctor restricted claimant to sedentary or light work, but typically, light jobs require, by definition, frequent standing and walking. The most common light unskilled job was retail sales clerk who does not lift over 20 pounds, but stands all day. With Dr. Bieri's restrictions of limited sustained ambulation with assistance or use of a cane, claimant was limited to sedentary work. Claimant could not renew his CDL because his limitation regarding turning his head precluded him from driving trucks or buses.

Mr. Cordray opined it was not reasonable to expect an employer would hire claimant. Mr. Cordray testified claimant was not only totally disabled but vocationally not placable in the labor market. No one would hire him and there are not jobs he could perform. It was not realistic to provide claimant with vocational rehabilitation services because there was not a reasonable expectation any employer would hire him.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2012 Supp. 44-501(a) states:

> (1) Compensation for an injury shall be disallowed if such injury to the employee results from:
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> (A) The employee's deliberate intention to cause such injury;
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> (B) the employee's willful failure to use a guard or protection against accident or injury which is required pursuant to any statute and provided for the employee;
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> (C) the employee's willful failure to use a reasonable and proper guard and protection voluntarily furnished the employee by the employer;
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> (D) the employee's reckless violation of their employer's workplace safety rules or regulations; or
>
> (E) the employee's voluntary participation in fighting or horseplay with a co-employee for any reason, work related or otherwise.
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> . . .
>
> [The] meaning of the work "willful," as used in the statute includes the element of intractableness, the headstrong disposition to act by the rule of contradiction.... "Governed by will without yielding to reason; obstinate; perverse; stubborn; as, a willful man or horse."[2]

[2] *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 735 P. 2d 247, *rev. denied* 241 Kan. 838 (1987).

In Bergstrom,[3] the Kansas Supreme Court held:

> When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction. *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554, 161 P.3d 695 (2007).

The fundamental rule of statutory construction is that the intent of the legislature governs when that intent can be ascertained.[4] We must give effect, if possible, to the entire Act and every part thereof. To this end, it is the Board's duty, as far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible.[5]

Black's Law Dictionary, defines "willful misconduct of employee":

> Under workers' compensation acts, precluding compensation, means more than mere negligence, and contemplates the intentional doing of something with knowledge that it is likely to result in serious injuries, or with reckless disregard of its probable consequences.[6]

The Board finds respondent proved claimant's injury resulted from his willful failure to use a guard or protection against accident or injury required pursuant to statute. Compensation must therefore be disallowed, and all other issues raised by the parties are moot.

There is no apparent dispute it is a statutory requirement that school bus drivers use seat belts.[7] There is also no dispute claimant removed his seat belt while operating respondent's school bus on October 31, 2012, and in so doing violated the statutory requirement.

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[3] *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

[4] *In re Marriage of Killman*, 264 Kan. 33, 42, 955 P.2d 1228 (1998).

[5] *KPERS v. Reimer & Koger Assocs., Inc.*, 262 Kan. 635, 941 P.2d 1321 (1997).

[6] Black's Law Dictionary 1600 (6th ed. 1990)

[7] See K.S.A. 8-2009 and 8-2009a; K.A.R. 91-38-7; see also CFR § 392.16. Administrative regulations have the force and effect of a statute. *Stansbury v. Hannigan*, 265 Kan. 404, Syl. ¶ 4, 960 P.2d 227, *cert. denied* 525 U.S. 1060, 119 S.Ct. 629, 142 L.Ed.2d 567 (1998); *Jones v. The Grain Club*, 227 Kan. 148, 150, 605 P.2d 142 (1980).

The term "willful" is used in a wide variety of Kansas statutes and is, in some circumstances, specifically defined. However, the Workers Compensation Act does not expressly define "willful" as used in K.S.A. 44-501(a)(1)(B), nor does the language of the provision refer to other definitions of "wilful" contained elsewhere in Kansas statutes or regulations. *Carter* quotes *Bersh*,[8] which in turn makes reference to Webster's New International Dictionary, although the willful failure provisions in the Act do not refer to that or any other dictionary. *Bergstom*, quoted above, instructs us to give plain meaning to unambiguous statutory language.

The *Carter* definition of willful is not what most reasonable people would equate with willfullness. The concept that "willful" means something other than intentional is uncertain based on recent directives to apply the law as written and based on the plain meaning of words. Our workers compensation statutes do not define "willful," let alone equate willful with headstrong, stubborn, unyielding or obstinate contradiction.

A definition of "willful" was recently discussed in *Unruh,*[9] a case involving the Kansas Consumer Protection Act. The Kansas Supreme Court ruled that "willful" included intent to harm the consumer. The Court cited a 1908 case indicating "willful" meant a "design, purpose, or intent to do wrong or to cause the injury."[10]

Justice Rosen, in his concurring and dissenting opinion in *Unruh*, observed that "willful" conduct is on par with intentional, deliberate, purposeful, non-accidental, designed and/or voluntary conduct, but did not require any intent to do wrong or cause injury.[11] Our statute regarding safety devices does not require intractableness, headstrong contrarian behavior, inability to yield to reason or any of the modifiers from *Carter*. Reading the statute as requiring a stubborn and perverse refusal to follow rules is contrary to interpreting and applying the law as written and ascribing common definitions to common words. Using the *Carter* definition of "willful" adds words, or at least uncommon definitions of words, to K.S.A. 2012 Supp. 44-501(a) that simply are not in the statute.

Clearly, K.S.A. 44-501(a)(1)(B) requires something more than only a failure to comply with the legal requirement that school bus drivers wear seat belts. Had the

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[8] *Bersh v. Morris & Co.*, 106 Kan. 800, 189 P. 934 (1920).

[9] *Unruh v. Purina Mills, LLC*, 289 Kan. 1185, 1205, 221 P.3d 1130 (2009); see also *DeBerry v. Kansas State Bd. of Accountancy,* 34 Kan. App. 2d, 813, 818, 124 P.3d 1067 (2005), *rev. denied* 281 Kan. 1377 (2006) (willful violation found where CPA intended to commit a forbidden act or abstain from doing something he was required to do); and *Dickens v. Snodgrass, Dunlap & Co.*, 255 Kan. 164, 181, 872 P.2d 252 (1994) ("Willful" is synonymous with voluntary, deliberate and intentional.).

[10] 289 Kan. at 1195 [quoting *Chicago, R.I. & P. Railway Co. v. Lacy*, 78 Kan. 622, 629, 97 P. 1025 (1908), *r'hg denied* Nov. 12, 1908].

[11] 289 Kan. at 1205.

legislature intended to implicate only a failure to wear a seat belt, it could easily have omitted the word "willful." However, the term "wilful" was included in the statute and it must according be given effect. There is no indication in the Act that a willful failure must include a belligerent or defiant intent.

"Willful" in this context is arguably more in the nature of a term of legal art, not necessarily the same as its lay definition. The definition of "willful" in Black's is persuasive because its definition deals specifically with circumstances like the one presented in this claim.

Under any of the definitions of "willful" discussed above, claimant's conduct in this claim was willful. Board finds that under the specific circumstances of this claim, claimant willfully failed to use a guard or protection against accident or injury required by a statutory requirement. The factors persuading the Board to find a willful failure are:

1. Claimant knew he was subject to a legal requirement to wear a seat belt, as evidenced by: (A) his admission to having such knowledge before his violation; (B) his testimony he always wore his safety belt while he was operating respondent's bus and he did so on the date of injury before he removed the seat belt; and (C) he was informed of his duty to wear the seat belt when he was approved for a CDL in 1998.

2. In removing his seat belt on October 31, 2012, claimant was under no coercion or undue influence, and his act of doing so was intentional and of his own volition.

3. It is a reasonable inference from the evidence that before the removal of his seat belt, claimant knew respondent's buses were equipped with such equipment for the bus drivers to wear.

4. Claimant knew that in a bus accident when he was not wearing his seat belt, he would increase his risk of injury.

5. If claimant had not removed his seat belt, he likely would not have sustained his injuries. Claimant testified he would not have been thrown to the steel floor board and stairwell of the bus had he remained in the seat belt. Testimony to the contrary is speculative and conjectural. The preponderance of the credible evidence supports the finding claimant's injuries resulted from his failure to wear the seat belt provided for his use and required by law.

The Board is mindful of claimant's undisputed testimony that the reason, and only reason, he removed his seat belt on the date of his injury was the shoulder harness caused pain in the area of his surgical scar. However, K.S.A. 44-501(a)(1)(B) contains no language suggesting the willful failure provision is subject to exceptions when such a failure results from a claimant's efforts to avoid discomfort or because a claimant feels he no longer wants to comply with the underlying statutory requirement.

CONCLUSIONS

1. Compensation is disallowed because respondent proved claimant's injuries resulted from his willful failure to use a guard or protection against accident or injury required pursuant to statutory requirement.

2. All other issues are moot.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated June 24, 2015, is reversed, and all other issues are moot.

IT IS SO ORDERED.

Dated this _____ day of February, 2015.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Clark H. Davis, Attorney for Claimant
CD7347@aol.com

John David Jurcyk, Attorney for Respondent and its Insurance Carrier
mvpkc@mvplaw.com
jjurcyk@mvplaw.com

Honorable Steven M. Roth, Administrative Law Judge